

3-2000-7672-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Application of
Robert D. Swanson for a Permit to
Work in Public Waters

FINDINGS_OF_FACT
CONCLUSIONS_OF_LAW
AND_RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on May 26, 1993, at 9:00 a.m. at the Captain's Room, Park Inn, 250 Canal Drive, Duluth, Minnesota.

Appearing on behalf of the staff of the Minnesota Department of Natural Resources (hereinafter also referred to as "DNR" or "the Department") was Donald A. Kannas, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55101.

Mr. Robert D. Swanson, 3101 Minnesota Avenue, Duluth, Minnesota 55802, appeared representing himself.

The record in this proceeding closed upon receipt of correspondence from Mr. Swanson on September 3, 1993, in response to submission by the DNR.

This Report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record

which may adopt, reject or modify the Findings of Fact, Conclusion, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner of Natural Resources shall not be made until this

Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by

this Report to file exceptions and present argument to the Commissioner of Natural Resources. Parties should contact Commissioner Rodney Sando, Minnesota

Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Robert D. Swanson's application for a permit to work in Public Waters is based upon plans that are reasonable, practical, and will adequately

protect public safety and promote the public welfare; and if so, whether a Public Waters work permit should be issued.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Applicant, Robert D. Swanson, resides at 3101 Minnesota Avenue, Duluth, Minnesota, on property he purchased in the Fall of 1986. Mr. Swanson's residence is located on a long narrow island approximately six miles long, separated from the mainland by a canal which connects Duluth Harbor with Lake Superior. This area of the City of Duluth is called Park Point. Park Point is a sand bar that extends from the mainland separating Lake Superior from St. Louis Bay and Superior Bay. Mr. Swanson's property has shoreline on Superior Bay.

2. In past years the Superior Bay shoreline on Park Point has been neglected and used by some residents as a garbage dumping area. The previous owners of Mr. Swanson's property had used the shoreline as a garbage dump. Shortly after he purchased the property in the Fall of 1986, Mr. Swanson began to clean up the rubble and garbage that had accumulated on the shoreline. As Exhibit 7 shows, at the time he purchased the property, the shoreline was cluttered with refuse including a kitchen sink, a bathtub, tires and various other discarded items. Testimony of Robert Swanson and Walter Pietrowski.

3. As a result of Mr. Swanson's efforts, the shoreline on his property has been transformed. Mr. Swanson is an avid gardener. In 1992, Mr. Swanson entered a nation-wide contest sponsored by Public Television for selecting the best garden in the United States. Out of approximately 600 entries, Mr. Swanson's garden was determined to

4. This case arises from Mr. Swanson's efforts to improve his property. Mr. Swanson filed an application with the Department requesting a Public Waters work permit to do work in Superior Bay; (a) to eliminate a safety hazard on his shoreline that would also allow him to dock his boat and (b) to build a retaining wall that would mirror the retaining wall on his next door neighbor's property.

The_Safety_Hazard

5. In the 1930s four wooden barges (or scows) were brought to shore and sunk on the shoreline of Superior Bay. Over the years they have become permanently embedded in the Superior Bay shoreline. One barge extends waterward from Mr. Swanson's property shoreline; it has a foundation measurement of 26 feet wide and 60 feet long. The three other scows are a part of the property shoreline of Mr. Swanson's next door neighbor at 3033 Minnesota

Avenue. The three barges have been arranged in a "U" creating a space that at one time was used as a marina. The barge closest to land now serves as a foundation for a house. Exs. 5, 15A and 14.

6. The barge that extends outward from Mr. Swanson's property into Superior Bay is barely visible on the water surface. It was used as a dingy dock until the 1960s. During a high water period in the late 1960s the side ribs of the barge were washed away leaving only the center wooden ribs. Exhibits 14 and 16 are aerial photographs of Mr. Swanson's property. Wooden ribs of the barge are visible in the photographs. Exs. 14 and 16. In approximately 1987, Mr. Swanson covered the center ribs of the barge with a deck that extends the entire length of the barge waterward into Superior Bay. The deck is 13 feet wide and 60 feet long.

7. Approximately two-thirds of the submerged barge on Mr. Swanson's shoreline was not visible during a period in 1985. Ex. 14. The barge was also barely visible during a period in 1986. Ex. 16. Because the submerged barge is not clearly visible during certain periods, it creates a hazardous condition to boaters or other persons using Superior Bay who are unaware of the presence of the submerged barge. The addition of the deck on the center ribs of the submerged barge alerts boaters and other persons of the underwater obstruction. DNR officials do not claim or argue in this proceeding that Mr. Swanson should remove the deck covering the barge structure.

8. The deck covers the center ribs of the submerged barge. The foundation of the barge extends six feet six inches beyond the deck on both sides. Steel pins that once held together the wooden ribs that were washed away protrude upward from the structure. The steel pins are rusty and razor sharp. They are submerged and not visible to persons using Superior Bay. The steel pins create a hazard to the safety of anyone fishing, swimming, boating or otherwise using the water near the submerged barge.

9. Mr. Swanson's permit application requests that he be authorized to cover the steel pins with timbers to eliminate the safety hazard. The timbers would cover the original foundation of the submerged barge. In his application Mr. Swanson states as follows:

The center section of the scow (barge) behind my house remains solid, but of the other sections, the ones on either side, only the bottom stringers and many razor sharp steel pins remain. I would propose to cover these sections with cribs made of 12 x 12 fir timbers pinned together with one-inch pins and filled with rip-rap and then faced and covered with cedar planking

The purpose of this project is one of safety. The bottom of the outer sections of the scow (barge) have many steel pins pointing upward and over the years have rusted

and become razor sharp. The tips of these pins are one to 2 feet below the water surface. The bottom planking consists of 3 x 10s which run under the center s

Ex. 5.

10. Mr. Swanson's project would eliminate the safety hazard. The project would add 6 feet 6 inches of deck on both sides of the existing deck. The finished deck would cover the original foundation width of the sunken barge, 26 feet. Ex. 5.

11. On Mr. Swanson's neighbor's property there are three other barges permanently embedded on the shoreline in various stages of disrepair. The deck proposed by Mr. Swanson will not extend waterward any further than these barges. Under the circumstances the addition to the deck will be an improvement to the shoreline.

12. The DNR Area Hydrologist, Mike Peloquin, investigated Mr. Swanson's plan for eliminating the safety hazard caused by the submerged barge. He recommended to his supervisor, Dan G. Retka, DNR Regional Hydrologist, that the permit be granted. In his investigative report to Mr. Retka, Mr. Peloquin stated as follows:

The purpose of the dock extension/repair work is to rebuild the structure to the original dimensions. The Applicant claims that the existing bottoms stringers present a hazard as the spikes used to hold together the original structure are protruding six inches up out of the stringer bottom, creating docking dangers.

A site inspection of the property revealed that the existing structure is not usable for mooring of large watercraft. When the water is low, the Applicant cannot tie a large boat directly to the existing center section of dock. The Applicant has a 30-40 foot boat.

The neighborhood consists of docks, retaining walls and remnants of old docks and other junk (see photos). Based on comments and MN Rules, Pts. 6115.0210 and 6115.0211, one concern that this structure will exceed the six foot wide limitation.

Alternatives to the proposal include:

1. Cutting off the bottom stringers adjacent to the existing 13-foot wide center section on both sides;
2. Pound the spikes down level with the bottom stringers so that they don't stick straight up.

It doesn't seem reasonable or practical to remove the protruding bottom stringers. It seems one would have to dismantle the whole works and then re-install the part

that is currently usable. Based on the low impact to the resource and the need for adequate docking, I recommend that the permit be issued for the project.

Ex. 11.

13. After considering the alternatives, Mr. Peloquin concluded that the method proposed by Mr. Swanson was more reasonable and practical and would have "low impact to the resource". Ex. 11.

14. A field investigative report by John R. Spurrier, DNR Area Fisheries Manager, indicated that the project as proposed by Mr. Swanson would have no anticipated impact on fisheries. Ex. 5.

15. On December 29, 1992, the Department issued an Order that denied Mr. Swanson's request for a permit to eliminate the safety hazard caused by the steel pins from the submerged barge. The primary reason for the denial are that Mr. Swanson's proposal would result in a deck wider than six feet, and the proposal is unreasonable because there are other effective alternatives that would have less impact on the Bay. Ex. 5.

16. The Department acknowledged that there was a safety hazard associated with the steel pins; however, it concluded that the best method for solving the problem with the least impact on the environment would be cutting away the two six foot sides of the sunken barge and removing them from the water. Ex. 5. At the hearing the Department took a different position; it argued that the most reasonable method for handling the safety problem would be the removal of the entire sunken barge from Superior Bay.

17. The Department's proposed method for handling the

18. The Department overruled the recommendations of Mr. Peloquin. During the hearing the Department offered no explanation for the rejection of Mr. Peloquin's recommendations.

19. The DNR provided no factual support for its proposal that removal of the sunken barge would have less of an impact on the environment than Mr. Swanson's proposal to cover the steel pins. The DNR fisheries and wildlife experts (Mr. John Spurrier, DNR Area Fisheries Manager and Mr. Rick Staffon DNR Area Wildlife Manager), who the Department considered calling to testify about the environmental impact of Mr. Swanson's plans, were not called to testify.

20. There are no plans for actual removal of the barge. If Mr. Swanson is not allowed to cover the steel pins, the safety hazard will continue to exist.

The_Retaining_Wall.

21. Mr. Swanson built a retaining wall to prevent shoreline erosion without a permit issued by the Department. As a part of his Application he seeks an after-the-fact permit for building the retaining wall.

22. Mr. Swanson's neighbor has built a retaining wall that extends at an angle from the wooden barge (that serves as the foundation for the house) to the property line. The angle is visible in Exhibits 5, 14, 15A and 19. Mr. Swanson has built a retaining wall that mirrors the shoreline created in part by the wooden barge on his neighbor's property. Ex. 19 and 15A. He has brought in concrete rubble and other fill and filled in an area that extends 20 feet along the shoreline and 29 feet waterward of the shoreline. The triangular area is enclosed with timbers creating an angle roughly similar to the angle on his neighbor's property and extends waterward approximately the same distance as his neighbor's house on the wooden barge. Exs. 5, 14, 15A and 19. The triangular area has also been filled with soil; flowers have been planted. Ex. 15A.

23. The angle of Mr. Swanson's retaining wall mirrors the angle of his neighbor's retaining wall. The purpose of Mr. Swanson's retaining wall is to prevent shoreline erosion by diminishing the impact of wave action on his property caused by the angle of his neighbor's retaining wall. The purpose of the wall was not the creation of a flower garden.

24. The Superior Bay shoreline along Park Point has been haphazardly maintained by landowners. Some landowners have done nothing to prevent erosion of their property shoreline. Other landowners have built retaining walls using concrete, wooden timbers, sheet piling or have used rip-rap to prevent their property from eroding. Ex. 21 (photographs 5-26).

25. The Department denied Mr. Swanson's after-the-fact permit request because the retaining wall created an "upland area" in violation of the Department's Public Waters Work Permit Rules, Minn. Rules Pt. 6115 (hereinafter also the "Rules"). The Department appeared particularly concerned that a flower garden had been placed in the triangular area created by the retaining wall. The Department ordered Mr. Swanson to remove the retaining wall. Ex. 5.

26. A specific exception to the rule prohibiting the creation of an "upland area" applies to retaining walls needed for the purpose of preventing shoreline erosion. The Department did not consider this exception when it ordered Mr. Swanson to remove the retaining wall.

Administrative_Notice_of_Sediment_Contamination_in_Superior_Bay.

27. In a letter dated July 3, 1993, the Administrative Law Judge announced that he would grant Mr. Swanson's request that administrative notice

be taken that substantial pollutants are trapped in the sediment of Superior Bay. Pursuant to Minn. Rules Pt. 1400.8100, subp. 2 and Minn. Stat. § 14.60, subd. 4 (1992), the Department was given an opportunity to submit oral or written testimony to contest the proposed Finding. The Department contested the proposed Finding by submitting the following documents:

- a. Pages five and six of a document titled 'St. Louis
- b. Maps showing the location of the five contamination sites identified in Exhibit 22. This document has been designated as Exhibit 23.
- c. Memorandum from Mike Peloquin, Area Hydrologist. This document has been designated as Exhibit 24.

28. The documents submitted by the Department support the proposed general finding regarding contamination in Superior Bay noticed by the Administrative Law Judge. The noticed finding is substantially the language contained in Finding of Fact paragraph 29.

29. The St. Louis River Basin which includes Superior Bay and St. Louis Bay has been strongly affected by heavy industrial uses including steel and cement manufacturing facilities, numerous paper mills and other heavy industries that have discharged commercial and industrial waste in the St. Louis River and ultimately into Superior Bay. Substantial pollutants are trapped in the sediment of Superior Bay.

30. According to Exhibit 22, the St. Louis River System Remedial Action Plan, the St. Louis River Basin has the following contaminants present in the sediment:

- a. Nutrients or conventional pollutants such as fertilizers, oil and grease;
- b. Inorganic or metal pollutants and cyanide;
- c. Synthetic or xenobiotic organic compounds such as polychlorinated biphenyls - PCBs, polycyclic aromatic hydrocarbons - originates from such sources as coal tars, petroleum and creosote.

Ex. 22.

31. There is little or no data available for determining whether there are elevated levels of these contaminants present in the St. Louis River Basin at Mr. Swanson's location. Five locations are known to have elevated levels of these contaminants with potential adverse effects upon animal and plant life. The known contamination sites are:

- (1) U.S. Steel site in Morgan Park;
- (2) the Stryker Embayment, Hallet Boat Slip (Interlake/Duluth tar site);

- (3) Newton Creek and Hog Island inlet of Superior Bay;
- (4) Western Lake Superior Sanitary District Sewage Treatment Plant; and
- (5) Crawford Creek.

Ex. 22

32. After identifying these areas of known elevated levels of contamination, Exhibit 22 notes that there may be other locations with elevated levels of organic or inorganic contaminants:

The five sites listed above represent locales of sediment contamination within the AOC (area of concern) but does not represent a complete inventory of all known sites because comprehensive sampling has not been performed throughout the sediment depositional areas of the AOC.

Ex. 22

33. Mr. Swanson's property on Superior Bay is within three to five miles of three of the sites which contain elevated levels of contaminants. The property is located within approximately three miles of the Western Lake Superior Sanitary District; three to four miles of the Hog Island Inlet site; and four to five miles of the Stryker Embayment site.

34. Being a part of the St. Louis River Basin, Superior Bay has sediment that contains the contaminants identified above in Finding of Fact, paragraph 30. These contaminants have potential adverse effects on aquatic plants and animals. These contaminants, however, are trapped below the water in the sediment of Superior Bay. Any action that unsettles the sediment could cause a release and dispersal of the contaminants causing an adverse impact on aquatic life.

35. Removal of the sunken barge or parts of the barge from the Superior Bay shoreline will unsettle contaminated sediment. The dispersal of contaminated sediment may have an adverse impact on aquatic plant and animal life.

Notice_of_Hearing.

36. On March 19, 1993, Commissioner Rodney W. Sando issued an Order and Notice of Hearing setting this matter for hearing on May 26, 1993 at 9:30 a.m.

37. On March 22, 1993, the Order and Notice of Hearing was served upon Robert Swanson and other federal, state and local officials. Ex. 2.

38. A copy of the Order and Notice of Hearing was published in the

Hermantown Star for two successive weeks Thursday, April 1, 1993, and Thursday, April 8, 1993. Ex. 3. The Order and Notice of Hearing was also published in the EQB Monitor, Vol. 17, No. 20, March 29, 1993. Ex. 4.

39. After listening to the tapes of the proceeding the Administrative Law Judge learned that there was an error in the numbering of the Exhibits. To solve this problem the Administrative Law Judge has prepared an Exhibit Log in which all Exhibits are properly numbered. Exhibit Log is identified as Exhibit 25.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The hearing Notice issued in this proceeding complies with the requirements of Minn. Stat. § 103G.311, the Minnesota Administrative Procedure Act and the rules of the Office of Administrative Hearings. All relevant substantive and procedural requirements of law and rule have been fulfilled so as to vest the Commissioner of Natural Resources and the Administrative Law Judge with jurisdiction in this matter.

2. Superior Bay is a protected Public Water pursuant to Minn. Stat. § 103G.005, subd. 15 (1992).

3. Minn. Stat. § 103G.245 requires a permit for any work activity affecting protected Public Waters. Any work affecting Superior Bay such as filling or placement of materials in or on the bed of Superior Bay requires the issuance of a Public Waters Work Permit.

4. Minn. Stat. § 103G.315, subd. 3 provides in part as follows:

If the Commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, the Commissioner shall grant the permit.

5. Mr. Swanson, as an applicant for a Public Waters Work Permit has the burden of proving by a preponderance of the evidence that the proposed project "is reasonable, practical and will adequately protect public safety and promote the public welfare". Minn. Stat. 103G.315, subd. 6(a).

6. Mr. Swanson has proved by a preponderance of the evidence that his proposed plans for eliminating the safety hazard is reasonable, practical, will adequately protect public safety and promote the public welfare.

7. Minn. Stat. § 103G.315, subd. 2 requires that the investigation by the Department "must be put in evidence at the hearing". The investigation of Mike Peloquin recommending approval of the permit was placed into evidence at the hearing. Because the Department denied the permit without offering any further factual evidence at the hearing or explaining the reasons for its rejection of the investigation by Mike Peloquin, the Department's denial of the permit is arbitrary.

8. The Department's proposed alternative -- to remove all or part of the submerged barge from Superior Bay -- is not reasonable or practical for the following reasons: (a) Removal of the barge may have an adverse environmental impact caused by the release and dispersal of pollutants trapped within the sediment of Superior Bay; and (b) Because no person has seriously considered moving the barge, it is likely that the barge will continue to be on the shoreline and as a result the safety hazard will continue to exist.

9. According to the definitions contained in Minn. Rules Pt. 6115.0170, the sunken barge is more appropriately categorized as a "structure" as that term is defined in Subpart 37, as compared to a "dock" as that term is defined by Subpart 7. The Department has erroneously categorized the sunken barge as a "dock".

10. Because the sunken barge may be categorized as a "structure" the rules that must be analyzed to determine whether or not Mr. Swanson's plans are

11. Because retaining walls usually result in the creation of an "upland area", that fact, standing alone, is not an adequate basis for denial of Mr. Swanson's request to build a retaining wall. Retaining walls are expressly excepted from the "upland area" prohibition if needed for prevention of shoreline erosion. Minn. Rules Pts. 6115.0190, subp. 5 and 6115.0210, subp. 5.

12. Because the Department failed to evaluate Mr. Swanson's concern for shoreline erosion, it has inadequately considered Mr. Swanson's request for a retaining wall.

13. The Department should re-evaluate Mr. Swanson's request to build a retaining wall; determine the potential for shoreline erosion; and analyze the request by application of Minn. Rules Pts. 6115.0190, subp. 5 and 6115.0210, subp. 5.

14. The Findings of Fact that are more appropriately considered Conclusions are hereby adopted and incorporated herein as Conclusions.

15. The Administrative Law Judge makes these conclusions for the reasons in the attached Memorandum. Where necessary, reasons contained in the

Memorandum are adopted and incorporated herein as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner issue an Order granting Mr. Robert Swanson a permit to eliminate the safety hazard by covering the steel pins, and requiring the Department to re-evaluate Mr. Swanson's request to build a retaining wall.

Dated: October _13, 1993.

/s/Allen_E._Giles_____

ALLEN E. GILES
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded (four cassette tapes)

MEMORANDUM

Safety_Hazard.

The upturned steel pins on the sunken wooden barge on Mr. Swanson's shoreline are razor sharp and not visible on the water surface. The steel pins present a safety hazard to anyone fishing, swimming, boating or otherwise using the water near the submerged barge. The Administrative Law Judge has concluded that Mr. Swanson's proposal for eliminating the safety hazard are reasonable, practical, will adequately protect public safety and promote the public welfare. That conclusion is based on the following analysis.

First, the plan to cover the steel pins with timbers will eliminate the safety hazard. Only the original foundation of the submerged barge would be covered. The method of construction Mr. Swanson plans to employ will require minimal work in Superior Bay, will not require dredging, and is not a novel construction method. There is no anticipated adverse impact on fisheries as a result of Mr. Swanson's plan. The DNR investigator of Mr. Swanson's project, Mr. Peloquin, recommended approval stating that Mr. Swanson's plan would have low impact on the resource. By eliminating the safety hazard Mr. Swanson's plans protect public safety and promote the public welfare. Compared to the condition of disrepair of the other barges, the resulting deck will also make a substantial improvement to the shoreline. For these reasons the Administrative

Law Judge has concluded that Mr. Swanson has met his burden of proof in this proceeding.

On December 29, 1992, the Department issued an order denying Mr. Swanson's request to cover the steel pins. The Department denied the permit because Mr. Swanson's plans would result in a dock wider than six feet and because there were effective alternatives that would have less impact upon the environment. The Department proposed two alternatives: Removing a part or all of the barge from the water or pounding down the steel pins so they did not stick u

The Department asserts that because effective alternatives exist, Mr. Swanson's plans are not reasonable or practical. The Department's assertion that other effective alternatives exist is not supported by any testimony received at the hearing. No one testified in favor of removal of the barge or any part thereof from the bay.

The record establishes that removal of the sunken barge from Superior Bay (as proposed by the Department) is not reasonable or practical. Substantial pollutants are trapped in the sediment of Superior Bay. Removal of the barge may result in the release and dispersal of the contaminants trapped within the sediment. That could result in adverse impact on aquatic plants and animals. In addition, the contamination problem could have a worse result if it is discovered that the area where the barge is located has elevated levels of contamination. Another problem associated with removal of the barge relates to who is going to move the barge? It appears that no person has a serious intention to move the barge. The Department has not suggested that it intends to move the barge. The Administrative Law Judge believes that because no person has seriously considered removing the barge, it is likely that the sunken barge would not be removed and the safety hazard would continue to exist.

1 Pounding the pins down has not been seriously proposed by any party. The problem seems to relate to what kind of equipment would be used to pound the pins down. Pounding the pins down is not a reasonable alternative because bending the pins over, while reducing the hazard, does not eliminate the problem. Persons may nevertheless be injured by the bent-over pins.

Because Mr. Swanson's proposal would not cause a substantial release and dispersal of polluted sediment, his plans would cause less impact on the environment. Although the Department indicated in its prehearing statement that it intended to call experts employed by the Department to testify about the impact of Mr. Swanson's plans on fish and wildlife, the Department failed to do this. This record discloses that one of the experts that the Department intended to call, Mr. Spurrier, has concluded that Mr. Swanson's plan would have minimal impact on fish. On the basis of this record, Mr. Swanson's plan is the only reasonable and practical method for eliminating the safety hazard.

The Department Order denying the permit is not supported by the record because it failed to consider and explain the reasons for its rejection of Mr.

Peloquin's investigation. Minn. Stat. § 103G.315, subd. 2, requires that the facts disclosed by the investigation by the Department of proposed plans for work in Public Waters must be put into evidence at the hearing. Mr. Peloquin made the on-site investigation and recommended approval of the permit. Mr. Peloquin's recommendation that the permit be allowed has been admitted into evidence as Exhibit 11. In denying the permit, the Department at no point explains the reasons for its rejection of Mr. Peloquin's recommendation. The Department's Order, which must ordinarily consider the investigation, ignores the recommendation and without explanation proposes just the opposite of Mr. Peloquin's recommendation. Without an explanation of the reasons for rejection of Mr. Peloquin's recommendation, the Department's decision, at least on the facts of this case, is arbitrary.

The Department argues in its post-hearing memorandum that the most important fact established at the hearing is that the deck that will result from Mr. Swanson's plans will be in excess of six feet wide. Minn. Rules pt. 6115.0211, subp. 2, prohibits any dock that exceeds six feet in width. The

Department asserts that because a specific rule applies to Mr. Swanson's plans, the reasonableness and practicality standard contained in Minn. Stat. § 103G.315, subd. 3 does not apply in this case. After consideration of this argument the Administrative

The deck that will result from Mr. Swanson's plans does not fit neatly within the definition of a dock contained in the rules. The Department has erroneously classified the sunken barge as a "dock". An analysis of the definitions contained in the rules indicate that the sunken barge is more appropriately characterized as a "structure".

Minn. Rules pt. 6115.0170, subp. 7, provides the following definition for "dock".

'Dock' means a narrow platform extending waterward from the shoreline intended for ingress and egress for moored watercraft or to provide access to deeper water for swimming, fishing, or other water oriented recreational activities.

Obviously, the barge itself is not a dock according to the above definition. The deck that will be built is for the purpose of covering the barge, it is not being built for the purpose of providing various water-oriented recreational activities. A close examination of the Public Waters Work Permit Rules suggests that the Rules do address a repair or reconstruction of a structure, such as the sunken barge. According to Minn. Rules Pt. 6115.0170, subp. 37, the sunken barge may fit within the definition of a "structure".

Subpart 37, Structure:

'Structure' means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending

over, anchored, or permanently attached to the bed or bank of a protected water.

Because the sunken barge may be categorized as a structure instead of a dock, different rules, Minn. Rule Pts. 615.0210, subp. 5 and 6115.0211, subp. 7A, apply to Mr. Swanson's application. Minn. Rule Pt. 6115.0211, subp.

5 authorizes repair or reconstruction of a "structure" if the reconstruction project:

- (1) Is the minimal impact solution to a specific need;
- (2) Is a minimum change or damage to the environment;
- (3) Is Consistent with local ordinances;
- (4) Physical or biological adverse effects must be subject to remediation;
- (5) Is consistent with water and related land management plans and programs; and
- (6) New structures must have a title registered permit.

Minn. Rules Pt. 6115.0211, subd. 7A provides in part as follows:

Permits for structural repair . . . shall be issued provided all of the following conditions are met:

- (1) The applicant demonstrates a need for the work;
- (2) The cost of the work will not exceed 50% of the replacement cost of the structure;
- (3) The degree of permanence of the structure will not be materially increased by virtue of constructing a new foundation or replacing the majority of the structure above the foundation;
- (4) The structure being repaired has a permit from the local land use or sanitary authority;
- (5) The degree of obstruction or structure size is not increased.

Insofar as any of these requirements are at issue in this proceeding, Mr. Swanson has met them. Because there is a safety hazard, Mr. Swanson has demonstrated that there is a need for the work to be done and that his plans represent the minimal impact solution that will cause less change or damage to the environment. Next, the degree of permanence of the sunken barge will not be materially increased by virtue of covering the steel pins. The barge is permanently embedded in the shoreline, it is difficult to see how the addition will affect the permanence of the sunken barge. Finally, because the area covered does not exceed the original foundation of the sunken barge the structure size will not be increased. Other issues such as cost of the work or

consistency with local ordinance or water management plans were not raised or contested at the hearing. Because Mr. Swanson's applic

Retaining_Wall.

Mr. Swanson built a retaining wall that mirrored the shoreline created by the retaining wall that had been built by his neighbor. The retaining wall built by his neighbor was aligned with the wooden barge that served as a foundation for his neighbor's house. It was at an angle that Mr. Swanson tried to repeat on his property. Mr. Swanson was concerned about the wave action coming from his neighbor's angled retaining wall causing erosion on his property. The reason for the angle on his property was to counteract the wave action that would result. The Department denied the request for a retaining wall without addressing Mr. Swanson's concern about the wave action and erosion on his property.

The Department concluded that the retaining wall that Mr. Swanson built created an upland area that was prohibited by the Rules. Minn. Rules Pt. 6115.0190, subp. 3, prohibits the creation of an upland area except where expressly authorized by the Rules. The Rules expressly allow the creation of an upland area if a retaining wall is needed to prevent shoreline erosion.

Contrary to the evidence, the Department concluded that the upland area was created for the purpose of a flower garden. At the hearing it was established that the upland areas was created as a part of an effort by Mr. Swanson to protect his shoreline from erosion or the wave action created by his neighbor's shoreline. The Department did not seriously consider Mr. Swanson's request for a retaining wall.

The tests for determining whether a retaining wall permit should be issued are contained in Minn. Rules Pts. 6115.0190, subp. 5, 6115.0210, subp. 5 and 6115.0211, subp. 5. The Department should re-evaluate Mr. Swanson's request for a retaining wall applying the standards contained in the applicable sections.

Previous_Work_in_Public_Waters_Violation.

The Administrative Law Judge notes that the Department attempts to portray Mr. Swanson as an intentional wrongdoer because he committed a public waters violation in 1986. After review of the 1986 violation, for which Mr. Swanson received an after-the-fact permit,² the Administrative Law Judge does not believe that it is appropriate to consider Mr. Swanson an "intentional wrongdoer".

However, the existence of the old wall, and the effects of the neighbor's more recent retaining wall, raise unanswered questions about the severity of the current erosion problem. These questions deserve to be answered before Swanson's application can be decided.

A.E.G.

2 Shortly after Mr. Swanson purchased the property he began to build a retaining wall to protect the shoreline of his property. While in the process of building the retaining wall, in 1986, he was informed that he needed a protected waters work permit to build the retaining wall. He was given a misdemeanor citation for working in Protected Waters without a permit. He was subsequently fined \$100.00 (\$50.00 suspended) for this unauthorized activity in October, 1986. Mr. Swanson applied for a permit to continue building a retaining wall to protect the shoreline of his property. Peder Otterson, the DNR official who originally investigated Mr. Swanson's unpermitted work recommended that Mr. Swanson be given a permit to build the retaining wall. Mr. Otterson stated as follows:

My original field inspection revealed the construction of a retaining wall along 38 feet of shoreline extending waterward a maximum of 12 feet. However, in later consultation with Swanson, the testimony of his neighbor, Pat Spearin, and review of the large-scale air photo of this site that pre-dates his work, I concur with his description of the work. The debris was removed and replaced by the retaining wall in approximately the same location. It is clearly an improvement over the previous conditi

Because the permit was applied for 'after-the-fact' there was not consideration made for alternative methods of shore protection such as rock rip-rap. However, the wall appears to be properly constructed and blends with the many other retaining walls that have been constructed on the bay side of the point. I recommend its approval.

Ex. 18.

The Department granted Swanson a permit for the wall.